**TAN KIM HOR & ORS**

**v.**

**TAN HENG CHEW & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
ZAINUN ALI J
[COMPANIES WINDING-UP NO: D2-28-507-2001]
9 OCTOBER 2001

***COMPANY LAW:*** *Winding-up - Petition - Petition to wind up on 'just and equitable' ground - Principles - Whether court to undertake critical evaluation of evidence and history of case - Alleged breakdown of trust and confidence within management - Whether proved - Real intentions of petitioners - Whether motivated by self interest and self preservation - Whether an abuse of process - Whether petition to be struck off - Companies Act 1965, s. 218(1)(i) - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)*

The parties herein were members of two families who together owned, controlled and managed the ninth respondent company, Tan Chong Consolidated Sdn Bhd ('the company'). The company, in turn, is the controlling shareholder in four public listed companies as well as numerous other companies ('Tan Chong Group'). The facts showed that the first petitioner's family controlled 44.6% of the company's shares, whilst the first respondent's family held the balance 55.4%.

Misunderstandings arose between the first petitioner and the first respondent over certain investments and a de-merger exercise within the Tan Chong Group, whereupon the petitioners sought to wind up the company pursuant to s. 218(1)(i) Companies Act 1965. In his petition, the first petitioner alleged that there had been a breakdown of mutual trust and confidence between members of the two families, such that it was 'just and equitable' that the company be wound up. This aside, the petition also evinced other complaints directed solely against the first respondent. The evidence further showed that, whilst members of the first petitioner's family collectively held minority share in the company, they nevertheless had control of the board of directors and were holding senior posts within the Tan Chong Group. This fact, however, was nowhere revealed in the petition and was hence withheld from the court.

The respondents applied to set aside the petition under O. 18 r. 19(a), (b) or (d) Rules of the High Court 1980. The primary issues that arose were: (i) whether the complaints of the first petitioner herein only represented domestic skirmishes between the parties; and (ii) whether the petition constituted an abuse of process and ought to be struck out.

**Held:**

**[1]** The power of the court to strike out a petition to wind up a company lies in its inherent jurisdiction and not in O. 18 r. 19 Rules of the High Court 1980. (p 752 d)

**[2]** A petition premised on the 'just and equitable' ground requires this court to examine the petition and affidavits before it. Also, in determining whether the winding-up proceedings here were vexatious, frivolous or an abuse of process, the court must look at the whole history of the matter before it, and not solely on whether or not the pleading had disclosed a cause of action. (pp 751 a-b & 752 a)

**[3]** The first petitioner's complaints, viewed in his failed attempt to make the first respondent agree to a winding up, was not motivated by a desire to redress the alleged wrongs allegedly committed against him and the other petitioners, but by reasons which were motivated by self interest and self preservation. (p 753 c-e)

**[4]** The first petitioner's complaints as regard the investment in China and Hong Kong and the increment of the first respondent's and second respondent's salary, were decisions which were taken within the legitimate confines of the company even if there was no prior consultation. There was no evidence to show that the first respondent, by his said actions, had exceeded his powers for some illegitimate or ulterior purpose. (p 753 i)

**[4a]** The first petitioner's complaints were exclusively directed against the first respondent alone and did not involve the other respondents. However, in order to support a winding up petition, the first petitioner ought to show that the relationship between all the shareholders have broken down and not just that they disagreed with one or two of them. (p 755 d)

**[5]** It is apparent that the first petitioner had suffered from a bad case of petulance and peevishness. This led him to mulish resistance to agree to sign the circular resolution to approve the de-merger, despite the serious consequences to the company and the shareholders should it not go through. In this, the first petitioner had not acted reasonably. Further, his letter of 7 September 1999 showed just how far the petitioners were prepared to go to put their own selfish interest to wind up the company ahead of the interests of the TCMH Group and all its public shareholders as well as the interest of the company and its shareholders as a whole. Clearly, there was bad faith on the part of the petitioners.
(pp 754 e-i & 755 a-b)

**[6]** One of the reasons advanced by the petitioners to wind up the company was to unlock their minority position. However, the petitioners did not disclose to the court that the first to the eighth petitioners were holding senior positions within the Tan Chong Group, including chairmanship of two public listed companies and managing director, deputy managing director and general manager of key subsidiaries. These facts showed that the petitioners were holding more key positions throughout the Tan Chong Group than the respondents. The petitioners' failure to disclose this and their majority on the company's board of management amounts to an abuse. (pp 755 h-i & 756 a-b)

**[7]** The first petitioner had failed to show that the petitioners were oppressed and denied participation in the affairs of the Company or other companies within the Tan Chong Group. The only thorn in the flesh seems to be that the respondents were in effective control of the company by virtue of their collective shareholding, whilst the petitioners were not. This fact strikes at the very heart of the petition. The petition, clearly, is an abuse of process. (pp 756 h & 757 b-h)

*[Petition struck out.]*

**Case(s) referred to:**

*Abdul Rahim Aki v. Kirubong Industries Park, Ebrahimi v. Westbourne Galleries Ltd & Ors [1973] AL 360* ***(refd)***
*Active Timber Agencies Pte Ltd v. Allen & Gledhill [1996] SLR* ***(refd)***
*Bandar Builder Sdn Bhd v. UMBC [1993] 4 CLJ 7* ***(refd)***
*Charles Forte Investments Ltd v. Amanda [1964] 1 Ch 240* ***(refd)***
*Chung Khiaw Bank Ltd v. Tio Chee Hing [1987] 2 MLJ 701* ***(foll)***
*Dato' Ibrahim Hj Ismail v. Onstream Marine Sdn Bhd [1998] 4 CLJ 526* ***(refd)***
*Ebrahimi v. Westbourne Galleries Ltd & Ors [1973] AC 360* ***(refd)***
*In Re Vernazza [1959] 1 WLR 622* ***(foll)***
*Kok Fook Sang v. Juta Villa [1997] 2 CLJ 116* ***(refd)***
*Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd [1994] 2 MLJ 781* ***(foll)***
*Maril Rionebel (M) Sdn Bhd v. Perdana Merchant Bank Bhd [2001] 3 AMR 29* ***(dist)***
*Re A Company [1983] BCLC* ***(refd)***
*Re A Company [1992] BCLC 701* ***(refd)***
*Re Lo Siong Fong [1994] 2 MLJ 72* ***(refd)***
*Re Semantan Estate (1952) Ltd [1952] 28 MLJ 285* ***(refd)***
*Re Sin Lee Sang Sawmill Sdn Bhd v. Leong Thong & Ors [1989] 2 CLJ 1209* ***(refd)***
*Ringtower Holdings Ptd [1988] 5 BCC 82* ***(refd)***
*Si & Si v. Hazrabina [1996] 2 CLJ 657* ***(refd)***
*Suppuletchumi Karpaya v. Palmco Bina [1994] 2 CLJ 561* ***(refd)***
*Tien Ik Enterprise Sdn Bhd & Ors v. Woodsville Sdn Bhd [1995] 1 MLJ 433* ***(foll)***
*Tractors Malaysia Bhd v. Tio Chu Hing [1975] 2 MLJ 1* ***(refd)***
*Williams & Humbert Ltd v. W & H Trade Marks (Jersey) Ltd [1986] 1 All ER 19* ***(refd)***

**Legislation referred to:**
Companies Act 1965, s. 218(1)(i)
Companies (Winding up) Rules 1972, rr. 26, 30(1), (2)
Rules of the High Court 1980, O. 18 r. 19(1), (a), (b), (d)

*For the petitioners - Cecil Abraham (MK Yee & Walter Preira); M/s Kamarudin & Partners*
*For the respondent - Lim Kian Leong (Low Chin Cheng); M/s Lim Kian Leong*

*Reported by WA Sharif*

## JUDGMENT

**Zainun Ali J:**
At the outset, it is observed that the respondent's application to strike out the petition and the affidavits in support thereof have ventured into areas which would require this court to make an optimum evaluation of the claim where the merits of the case would fall to be considered. This, the court cannot do.

It brings forth the principle laid down in *Bandar Builder Sdn Bhd v. UMBC* [1993] 4 CLJ 7, which exhorts that when recourse is made to summary process under any of the four limbs of O. 18 r. 19(1) RHC 1980 the power of the court does not extend to examining the documents and facts of the case in minutiae, just so that the court can decide whether the party has a cause of action or a defence.

The court went on to state that summary procedure can only be had, when it can clearly be seen that a claim or answer is, on the face of it, "obviously unsustainable".

Given this exhortation and mindful of the need to be sparing in the exercise of the court's power, this court then proceeded to consider the instant application.

In reading the capacious amount of material before this court, it is completely in order for this court to submit the evidence before it, to critical examination as manifested in *Tractors Malaysia Bhd v. Tio Chu Hing* [1975] 2 MLJ 1 (privy council) and the later decision of *Suppuletchumi Karpaya v. Palmco Bina* [1994] 2 CLJ 561.

The opening passage in *Tractors* for instance, states that the power to dismiss an action summarily without permitting the petition to proceed to trial is a drastic power. It should be exercised with the utmost caution.

However, the Privy Council in that case added that in refusing to submit the evidence to critical examination, the Federal Court, erred in law.

Then in the case of *Chung Khiaw Bank Ltd v. Tio Chee Hing* [1987] 2 MLJ 701, it was stated that in determining whether proceedings were vexatious, the court must look at the whole history of the matter, not solely whether the pleading had disclosed a cause of action.

Thus it is clear that this court can have a critical evaluation of the evidence, in determining whether the petition discloses a reasonable cause of action or whether the petition was *mala fide* and hence an abuse of the court process.

In the instant petition, the petitioner had sought to wind up the 9th respondent company pursuant to s. 218(1)(i) on the 'just and equitable' ground.

The issue of whether a company should be wound up is a question of fact, to be decided in each case, in the light of certain general principles. In this case, the petitioners sought equitable relief and the petition is premised primarily upon a breakdown in the relationship of mutual trust and confidence between the two factions, ie, the respective families of both the petitioners and the respondents.

**The Background**

It might be said that with a petition which ran into 166 paragraphs, with an almost equal or more amount of material in the affidavits filed herein, this court cannot help but be completely appraised of the antecedent of this matter.

Tan Chong & Co was founded in the early 1930's by Tan Chong who is the patriarch of the Tan Chong Family, as a sole proprietorship. It was in or around 1946 that the partnership of Tan Chong and Co (TC & Co) as food supplier was founded, where the partners in the business of TC & Co were Tan Chong, the 1st petitioner (who is the eldest son) and Tan Sri Tan Yuet Foh (who is the father of the 1st respondent).

During much of the decade and thereafter, the business flourished and the company diversified into the car distributorship business, dealing with Nissan and Datsun vehicles.

Then on 16 February 1959, Tan Chong & Sons Motor Company Sdn Bhd (TCM) was incorporated, where the Tan Chong siblings were the subscribers and directors.

TCM therefore handled the motor business whilst the food supply business remained with TC & Co.

According to the 1st petitioner in his petition, much of the business of the two companies were conducted informally and on a consultative basis among the family members.

The car business expanded and saw remarkable forays into other areas such as car rentals, distribution of commercial vehicles and industrial equipment, and tour and travel services, which necessitated the incorporation of companies for these purposes.

The expansion of the business in Malaysia also saw a parallel expansion regionally, when in 1966, Tan Chong & Sons Motor Company (Singapore) Private Ltd (TCCS) was incorporated and in 1968 Singapore Automotive Industries Private Limited (SAI) was acquired.

With the expansion of TCM's business in Malaysia and Singapore, the younger generation of the Tan Chong family were invited to join TCM and to assist the founding members with running the company.

The expansion of the business led to the natural progression of the company going public. However, to ensure that the Tan Chong family would remain in control of the business, the company's financial advisor advised that this could be achieved if the Tan Chong family held a controlling block of shares in the newly incorporated public listed company where the shareholders of the investment holding company would comprise entirely of the members of the Tan Chong family.

This would essentially enable the Tan Chong family members to be majority shareholders in the public listed company.

Thus Tan Chong Motor Holdings Berhad (TCMH) was incorporated on 4 October 1972, first as a private company and subsequently converted into a public company on 1 September 1973.

TCM and all its subsidiary/associated companies and business were then wholly acquired by TCMH.

The 9th respondent ie, Tan Chong Consolidated Sdn Bhd (hereinafter called "the company") was thus incorporated on 7 June 1973 as the investment holding company, formed for the purpose of holding the Tan Chong family's controlling block of shares in TCMH. All the shareholders of TCMH became shareholders in the company in exchange for their shares in TCMH.

The first subscribers and directors of the company were Tan Yuet Foh and 1st petitioner. Form 24 of the company as at 16 June 1973 denotes the 50:50 shareholder of both families – Annexure B.

From the records before this court, as at exh. THC – 18, it would be seen that on 16 June 1973, the 9th respondent company resolved to purchase 9,230,000 shares of RM1 each in Tan Chong Motor Holding Sdn Bhd (TCMH)

(which was later converted into a public company and listed on 4 February 1974) out of which 5,115,000 were purchased from Tan Yuet Foh & 4,1115,000 were purchased from the 1st petitioner.

Out of the 9,230,000 shares in TCMH which were purchased by the 9th respondent Co 55.417% came from Tan Yuet Foh and 44.583% came from the 1st petitioner.

On 28 August 1974, the 9th respondent company allotted for cash 3,230 shares of RM1 each of which 1,115 in total were issued to members of the 1st petitioner's family and 2,115 were issued to members of Tan Yuet Foh's family.

After the allotment on 28 August 1974, Tan Yuet Foh's family owned a total of 5,115 shares in the 9th respondent company and the 1st petitioner's family owned a total of 4,115 shares in the 9th respondent ie, in the ratio of 55.417% held in Tan Yuet Foh's family and 44.583% held by the 1st petitioner's family.

The proportion of 55.417% & 44.583% was maintained from 28 August 1974 until the present day.

The 9th respondent company and the related companies continued to flourish.

When Tan Yuet Foh passed away on 8 October 1985, his eldest son, the 1st respondent (Tan Heng Chew), took over his role as head of the Tan Yuet Foh's family.

Both sets of families (the 1st petitioner's & the 1st respondent's) continued to work and existed side by side in the family company.

Further developments in the family business saw efforts made by 1st petitioner & 1st respondent to reorganise the family business, ie, the demerger of TCMH into diverse activities as to rationalise operations.

This huge corporate exercise is to restructure the TCMH Group in Malaysia into three public companies namely, TCMH, Warisan & APM, all of which were to be listed on the 1st board of the Kuala Lumpur Stock Exchange (KLSE).

TCMH was then divided into three main divisions:

(i) the motor & truck division

(ii) the auto parts division &

(iii) the non motor division

The re-organisation will see TCMH divesting itself of the companies in the auto parts and the non-motor division to their own listed holding companies, namely APM Automotive Holding Berhad (APM) and Warisan TC Holdings Berhad (WTCH) respectively.

To retain control of the above de-merged vehicles, the Company will acquire a direct interest of 22.64% in APM & 22.64% in WTCH respectively.

In addition, the company will also acquire an indirect interest of another 20% in APM and 20% of the issued share capital of APM and WTCH.

The de-merger exercise had taken months to structure. Just before the EGM of 11 September 1999 it had then reached a crucial point where the company (the 9th respondent) as the single biggest shareholder in the TCMH Group was required to confirm its participation.

But things were brewing underneath the familial surroundings, culminating in a 'stand-off' between the 1st petitioner and the 1st respondent.

**The Petitioner's Case**

The averments of the 1st petitioner suggest that the management style of both he and the late father of the 1st respondent (Tan Sri Tan Yuet Foh) had always been on a consultative basis; that both he and Tan Yuet Foh had enjoyed an amicable relationship based on mutual trust and understanding.

However the management style of the 1st respondent apparently ruffled the 1st petitioner's feathers.

According to the 1st petitioner, some important business decisions were made by the 1st respondent without his prior knowledge and approval. These included:

(i) The Nissan diesel joint venture in China

(ii) The Subaru joint venture in China

(iii) The purchase of office space in Hong Kong

When confronted by the 1st petitioner, the 1st respondent apparently responded that he would consult the 1st petitioner on future investments.

According to the 1st petitioner, the 1st respondent also made one other business decision in early 1999, that of increasing his own and his brother's salaries, without first consulting him.

The 1st petitioner then met with the 1st respondent and voiced his concern on the 1st respondent's failure to consult him and reminded him of the company tradition of prior consultation before making any major decision.

The 1st petitioner, at para. 102 of his petition averred that the 1st respondent "appeared receptive" to his concerns, and that he promised that he would consult the 1st petitioner in future, before making any major decision with regard to the business, salaries and promotion of the company.

Upon reading the petition, this court finds that the most important provision and perhaps the lietmotif of the petition lies in the averments made by the 1st petitioner in para. 103, which reads as follows:

> 103. I then realised that THC (Tan Heng Chew) was determined to disregard my views and his promises of keeping to the spirit of our family's consultative style of management rang hollow. The possibility of the business breaking up in the future in light of THC's (Tan Heng Chew) recent behavior became real. For the first time since I gave my 5% stake in the company to TYF (Tan Yuet Foh), I started to worry about my family's possible position as "minority" shareholders in the company and the fact that I am now in the twilight of my life and should resolve this matter soon. I was advised by my solicitors that one way I could protect my family's possible position as "minority" shareholders in the Company would be to procure a winding-up of the Company and by so doing allow the two families to hold shares directly in TCMH in their own respective capacities. In this way, my family's shareholding would not be locked-in within the company and we would not be placed in a vulnerable position of minority shareholders.

According to the 1st petitioner, since at that moment in time both he and the 1st respondent were looking at a major re-organisation of the business ie, the de-merger exercise, he thought it was the opportune moment to approach the 1st respondent regarding his proposal to wind up the company, (as reflected in para. 103 of the petition).

They met on 25 June 1999 and 1st petitioner explained that such a step was essential as the mutual trust and confidence that had existed between him and the 1st respondent had been whittled away, given the 1st respondent's decisions adverted to earlier, which ignored discussions and consultations with him.

The 1st petitioner averred that the 1st respondent was not receptive to his proposal on the ground that this corporate move to wind up would complicate the ongoing de-merger exercise, which had taken months to prepare.

The 1st petitioner and the 1st respondent met again on two more occasions to discuss the re-structuring of the company, but nothing came until a meeting of 10 August 1999 where 1st petitioner and 1st respondent met, together with two independent directors of TCMH to discuss these areas of concern.

After a discussion, according to 1st petitioner a draft memorandum of intent was prepared.

According to the 1st petitioner, the said memorandum of intent was drawn up to ensure that despite the proposed restructuring of the business, the shares held by the members of the families will be split into two groups instead of being held under one company; and that the two families would continue to jointly control the Tan Chong Group and cooperate with each other in the administration and operation of the business. (see para. 117 of the petition).

A meeting was arranged between the 1st petitioner and the 1st respondent on 24 August 1999, where the 1st respondent indicated his disagreement with the 1st petitioner's proposal.

Subsequently an extraordinary general meeting was held on 11 September 1999 (11 September EGM), to formally approve the de-merger exercise. In what is seen as a diabolical twist, the 1st petitioner caused a letter to be issued prior to the EGM which in essence says that the petitioners will only sign the de-merger proposal if their proposal to restructure the company is acceded to (see letter dated 7 July 1999). In short, the EGM ended in a fracas.

One of the bane of the 1st petitioner is that the 1st respondent wanted to vest himself the sole signatory of documents pertaining to the de-merger exercise.

According to the 1st petitioner although he requested that he be made co-signatory this was not acceded to. The resolutions on the de-merger were put to the vote, and the votes were counted in accordance with the shareholdings of each shareholder and as the 1st respondent's family shareholding is collectively 55% of the total issued shares in the company, the first four resolutions were passed with 55% in favour.

In the words of the 1st petitioner, the said 11 September 1999 meeting marked a 'watershed' in the relations between the two families and that "the breakdown of mutual trust and understanding was now complete". (para. 132 petition).

The months following 11 September meeting saw a catalogue of ills, which the 1st petitioner attributed to the 1st respondent.

A meeting was held on 2 December 2000 between the two families (though 1st respondent was not in attendance) and it was resolved that the mechanics of splitting the company would be taken up again, but ensuring that the family control of the Tan Chong Group of Public Companies would be maintained.

According to the 1st petitioner a proposed head of agreement was drafted, to be discussed and agreed upon by both families [Annexure E].

Then on 5 April 2001, the 1st respondent responded, by making an offer to the 1st petitioner's family to buy their shares at market value [See Annexure F].

The 1st petitioner was outraged by this audacity and averred at para. 160 of the petition, that he was "greatly offended". The 1st petitioner also averred that the offer was "meant to insult".

The 1st petitioner then through his solicitor made a counter offer to buy the 1st respondent's shares, without conditions. [Annexure G].

The 1st respondent declined the offer through his solicitor's letter of 3 May 2001 [Annexure H].

In the circumstances, the 1st petitioner found it just and equitable to wind up the company pursuant to s. 218(1)(i) on the "just and equitable" ground; hence the petition was filed on 2 May 2001.

**The 1st Respondent's Case**

The other side of the great divide saw the 1st respondent filing an application to strike out the petition under the provisions of O. 18 r. 19(1)(a)(b) or (d) of the Rules of the High Court 1980, on the grounds, *inter alia*, that it disclose no reasonable cause of action or are frivolous or vexatious or an abuse of the process of the court and/ or under the inherent jurisdiction of the court on the grounds, that it is an abuse of the process of the court and that the costs of the application be borne by the petitioners. The grounds of this application are that there exist no reasonable cause of action and/or an abuse of the process of the court as contained in the affidavit by Dato' Tan Heng Chew affirmed on 15 Jun 2001.

Since the antecedents of the Tan Chong conglomerate has been dealt with above, the 1st respondent's case shall begin with events prior to 11 September 1999 EGM.

Based on the registered shareholdings the petitioners hold collectively approximately 44.6% and the 1st to 8th respondents hold collectively approximately 55.4% of the total issued shares of the 9th respondent company.

The company is the largest (but not the majority) shareholder in the four public listed companies ie, TCMH (45.28%), Warisan (42.64%), APM (42.64%) and TCIL (45.28%) and is generally recognised as having effective control of those companies.

Since the death of Tan Sri Tan Yuet Foh (TYF) the 1st respondent's father in 1985 until August 2000, the shareholders of the company had seven directors ie, the 1st, 2nd, 3rd and 4th petitioners and the 1st, 2nd and 4th

respondents, to manage the affairs of the company, in the interest of all the shareholders.

It is the 1st respondent's case that from 1985 until 25 August 2000, the 1st to 4th petitioners as the majority on the board actually had the ability to control the day to day affairs of the company.

It is also the 1st respondent's case that as the respondents held a minority on the board of directors of the company, they could not possibly manage or conduct the company in its daily affairs, detrimental to the interests of the petitioners. In any case, the 1st respondent stated that it is a pertinent point that despite the apparent acrimony, the board of directors of the company had, on 10 May 2001, unanimously agreed to authorise the 4th respondent to be its proxy to vote to re-appoint the 1st petitioner as a director of TCMH, APM and Warisan, notwithstanding that the 1st petitioner is now more than 70 years old [see board resolution, exh. THC8].

The 1st respondent noted, not without a touch of irony, that despite the announcement of the filing of the petition to the public on 24 May 2001, the 1st petitioner was duly re-appointed a director of APM on the same day and director of warisan and TCMH on the following day, ie, 25 May 2001.

The 2nd petitioner was also re-appointed as director of TCIL on 22 May 2001. [See exh. THC9]

In view of the above, it is the 1st respondent's case that the allegations of breakdown of mutual trust and understanding arising from his (1st respondent) conduct is without basis and justification.

The 1st respondent went on to state that the infamous 11 September 1999 EGM was called for a specific purpose, ie, to approve the company's participation in a huge corporate exercise (De-merger) to restructure the TCMH Group in Malaysia, as was known to the petitioners. The 1st respondent stated that he was the sole signatory to the de-merger exercise so as to expedite the corporate exercise.

In any case, even if the 1st petitioner was made co-signatory, the demerger might have been impeded, since the 1st petitioner had already intimated that the petitioners will agree to the de-merger only if the respondents agree to wind up the company.

By so holding the company to ransom, the 1st respondent felt it would be difficult for the de-merger exercise to proceed should the 1st petitioner be made co-signatory.

a The 1st respondent stated that somehow the 1st petitioner had slanted the fact and circumstances leading to and surrounding the EGM, giving it a sinister twist.

The de-merger had been structured in order to split the TCMH Group in Malaysia into three public companies namely TCMH, Warisan and APM, all b of which were to be listed on the 1st board of the KLSE.

The de-merger exercise had taken a lot of time to plan and structure. At that particular time, it had reached a crucial point where the company, as the single biggest shareholder in the TCMH Group was required to confirm its c participation, and as if on cue, it was during these critical moments that the 1st petitioner had indicated his desire to wind up the company (see para. 107 and 108 petition).

It is noted also that at the relevant time the 1st, 2nd, 3rd and 4th petitioners constituted four out of seven members of the board of directors of the company d & so their consent was necessary for the board resolutions to be passed to approve the company's participation in the de-merger exercise.

But when a circular resolution was given to the directors of the company to sign to proceed with the de-merger exercise, the 1st, 2nd, 3rd and 4th e petitioners refused to sign the document.

Their refusal meant that the company could not proceed with its participation in the de-merger exercise, unless an EGM was called for the shareholders to approve the exercise. A copy of the circular resolution which the 1st to 4th petitioners refused to sign, is attached as exh. THC 2.

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The delay in obtaining the signatures of the 1st to 4th petitioners caused concern to the merchant bankers and company secretary for the demerger exercise – (see the letters dated 25 August 1999, 27 August 1999 and 9 September 1999 explaining their concern [see exh. THC3]).

g The petitioner's refusal to approve the de-merger would mean that it would be called off and the losses to the shareholders of the TCMH Group would have been immense. Exhibit THC4 (attached), which is the independent advise from Malaysia International Merchant Bankers shows details of the de-merger exercise, demonstrating the clear benefits it would give shareholders. As could h be seen, the post de-merger value of the group (TCMH, APM and Warisan) increased by approximately RM674,680,000 (including cash benefits paid to shareholders).

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On the downside, if the de-merger exercise is aborted, due to the petitioner's refusal to participate, the company may well be faced with hefty damages.

These serious consequences were apparently quite lost on the 1st petitioner, who patently refused to sign the de-merger. As had been stated earlier, just prior to the EGM, the 1st petitioner wrote to the company on 7 September 1999, to state that he and his family would only agree to vote in favour of the resolutions at the EGM if the parties concurrently proceeded with a restructuring of the company along the lines of the memorandum of intent whose terms included liquidation of the company and joint management of the group.

As stated by the 1st respondent, in effect, the 1st petitioner was "threatening to derail the entire de-merger exercise if the respondents do not agree to wind up the company". (see 1st petitioner's letter and memorandum exh. THC6).

Thus the EGM was therefore necessary to pass the resolutions and because of the greater number of petitioners in the company it was felt that it would have been necessary for the votes to be counted by poll.

And so the EGM came to pass, where in view of the majority holding held by the respondents, voting was made in favour of the demerger.

It is the 1st respondent's case that it was after the de-merger, that Tan Chong Group embarked upon a concerted effort to upgrade the professionalism and transparency of its management processes. Under the guidance of the boards of the various companies their aim was to increase professionalism and to put in place aspects of corporate governance. These new measures cause tensions, as resist to change is naturally inherent.

It is the 1st respondent's case that the 4th and 5th petitioners have characterised every change in management procedures as a personal attack by the 1st respondent, resulting in a prolific exchange of letters of complaints to the 1st respondent.

Though the 1st respondent tried to explain their corporate vision to the 4th and 5th petitioners, they spurned these explanations as being cynical and insincere.

The problems attributed to the 1st respondent escalated after the EGM, culminating in the 1st petitioner filing a petition and the 1st respondent filing a notice of motion on 15 June 2001 to strike off the petition.

The 1st respondent's application is premised on 16 grounds and may be summarised broadly as follows:

(a) Technical and/or procedure objections [ground (a) to (c)];

(b) The petition does not disclose any reasonable cause of action [grounds (d) and (e)];

(c) Allegations pertaining to the merits of the petition [ground (f) - (M)];

(d) The conduct of the petitioner after filing the petition [ground (n) - (o)].

(See attached grounds annexure f)

**The Technical Objection**

The first ground raised by the respondent that the petition was wrongly intituled had been dealt with and has since become academic. The petitioners had obtained leave of court on 20 July 2001 to include the intitulement to reflect the specific provision under which the petition was brought.

The second procedural objection relates to non-compliance with Companies (Winding-up) Rules 1972, since rr. 26, 30(1) and 30(2) expressly provide that the petition should be verified by the affidavit verifying petition in the prescribed form.

However since there is no express prohibition in the Rules against filing of affidavit, parties are at liberty to file affidavits to support the petition to prove their allegations. In any case parties are at liberty to file further affidavits in support of or in opposition to the petition. Hence the Rules should be construed in a permissive rather than in a prohibitive manner, as decided in *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 781.

Thus this court finds that this ground must fail.

The third procedural objection says that there is no provision in the Companies Act 1965, or the Companies (Winding Up) Rules 1972 to claim against the 1st to 8th respondents, since the only remedy sought is winding up of the 9th respondent. However this court takes the same approach as that of the court in *Abdul Rahim Aki v. Kirubong Industries Park, Ebrahimi v. Westbourne Galleries Ltd & Ors* [1973] AL 360 and *Tien Ik Enterprise Sdn Bhd & Others v. Woodsville Sdn Bhd* [1995] 1 MLJ 433.

This is so since the petition is premised on allegations made by one faction (the petitioners) against the other faction (the 1st to 8th respondents). Thus the 1st to 8th respondents are proper parties to this action as they would be directly affected by the allegations and the relief sought.

Before embarking into the other areas of the grounds for striking out, it bears emphasis that in determining whether the proceedings are vexatious, filivolous or an abuse of process, the court must look at the whole history of the matter before it, not solely whether the pleading had disclosed a cause of action. This principle is clearly laid down in *Chung Khiaw Bank Ltd v. Tio Che Hing* [1987] MLJ 701.

In an earlier English decision, *In re Vernazza* [1959] 1 WLR 622, Lord Parker LJ stated that:

> The question whether proceedings instituted by the respondent are determined solely by inspecting the document initiating the proceedings to see whether it discloses a cause of action; the court must have regard to the whole history of the matter, as it does, when an application is made to strike out a pleading under the inherent jurisdiction.

In a decision of the High Court of Singapore in 1996 ie, *Active Timber Agencies Pte Ltd v. Allen & Gledhill* [1996] SLR, it was held that in an application to strike out a statement of claim on the ground that it was frivolous and vexatious, the court was entitled to and ought to look at the whole history of the matter. In such an application, the court in its inherent jurisdiction was entitled to look at the affidavits as to the history of the matter and if in the light of the history the action was vexatious, the pleading could be struck out and the action dismissed.

Thus fortified, this court proceeded in making a critical evaluation of the evidence on affidavits before it, to determine whether the grounds as asserted by the respondents are justified, bearing in mind the principle that at the striking out stage, it is not concerned with the respective merits of the claim.

The powerful statement made by the court in *Maril Rionebel (M) Sdn Bhd v. Perdana Merchant Bank Bhd* [2001] 3 AMR 29 looms large in the petitioner's stance, in that the application to strike out manifests the abusive nature of the respondent's application.

However this court finds that even if striking out applications are frowned upon for holding up the hearing of the petition itself, this court finds that the judicial concern in that case was up against an entirely different set of facts and could therefore be distinguished from the instant case, as authorities such as *Si & Si v. Hazrabina* [1996] 2 CLJ 657 would have shown.

Thus given the authority in *Si & Si* and others such as *Dato' Ibrahim Hj Ismail v. Onstream Marine Sdn Bhd* [1998] 4 CLJ 526 as well as the English case of *Re A Company* [1983] BCLC, this court's jurisdiction in striking out a petition such as the present is never in doubt.

The petition which is premised on the 'just and equitable' ground requires this court to examine the petition and affidavits before it, since what is 'just and equitable' in a case must depend on its particular facts.

Since these expressions are of the widest import, they ought not to be cribbed, cabinned and confined by the creation of categories within which a case must be brought, in order that it will be held to be 'just and equitable' that a company be wound up.

Thus mindful of the legal principles and the court's constraints in this application, this court then proceeded to consider the matter by reading the petition itself and the affidavits in support therein, to ascertain, based on these documents, whether the allegations of the petitioner have any basis and whether this court could exercise its power to strike out the petition.

The power of the court to strike out a petition to wind up a company lies in its inherent jurisdiction and not in O. 18 r. 19 RHC 1980 although judicial differences have been expressed over this legalese. However there is much to be said for the court's decision in *Re Lo Siong Fong* [1994] 2 MLJ 72 on this point; thus this court agrees that this court has inherent jurisdiction to strike out a petition that amounts to an abuse of the court's process.

A close perusal of the petition and the numerous averments in the body of the petition and evidence of allegations are already before this court and adverted to earlier, are to be considered now.

As could be ascertained from the court records, there were two significant events before 11 September EGM which led to this unhappiness and they are that:

(i) The 1st respondent made decisions on the Nissan JV in China as well as the Subaru JV and purchase of office space in Hong Kong. All these decision were taken without consulting the 1st petitioner.

(ii) The 1st and 2nd respondent increased their salaries without consulting the 1st petitioner and that his son's salaries were not increased.

The 1st petitioner had then approached the 1st respondent before 11 September EGM and broached the subject (of winding up).

It is imperative for this court as a court of equity, to subject the exercise of legal rights to equitable considerations, that is of a personal character arising between one party and another which may make it inequitable to assert on legal rights or to exercise them in a particular or specific way.

The most singular, significant paragraph in the entire petition is found at para. 103 of the petition.

This paragraph had been quoted above and it takes a little more than a normal conviction, to assert that it leads to a manifestation of the 1st petitioner's real intention; Even objectively, it could be viewed that the intention seems to be that the 1st petitioner's side of the family is not to be sidelined in the "Tan Chong scheme of things".

As the evidence have shown, the 1st petitioner had harboured feelings of disquiet against the 1st respondent. This feeling fermented into what appeared to be intense pique even before 11 September EGM.

The 1st petitioner's subsequent complaints when viewed in his failed attempt to make 1st respondent agree to winding up, could be seen to be motivated not by the 1st petitioner's desire to redress the alleged wrongs committed against him and the other petitioners, but by some other reasons best known to himself. As can be seen, the catalogue of complaints of the 1st petitioner were all against the 1st respondent (see petition paras. 134 to 152).

The statement of the 1st petitioner at para. 103 of his petition is most telling. In the light of the family background, it suggests several factors. The first of it is that his complaints against the 1st respondent basically stems from the slights (imagined or otherwise) from a brash, younger man.

Secondly, the stirrings of disquiet he felt were largely motivated by self-interest and self-preservation and not because there exists a real breakdown of trust and understanding.

Thirdly, and more importantly, it could be inferred that all the agitations were excited almost entirely because the 1st petitioner had already harboured an intention to wind up the company and thus the failure to convince the 1st respondent to meet him on his terms (to restructure and split the shares) seemed to seal the fate of the company.

It is important to examine whether the complaints of the 1st petitioner are such that they represent a mere domestic skirmish, which in itself is insufficient to support his allegation, as amply demonstrated in the case of *Dato' Ibrahim Haji Ismail v. Onstream Marine Sdn Bhd* [1998] 4 MLJ 86.

The only complaint of the 1st petitioner against the 1st respondent before 11 September EGM are the decisions made on Nissan JV in China, Subaru JV in China, buying office space on Hong Kong and increasing his and 2nd respondent's salaries, without consulting him.

These decisions are all matters which were taken within the legitimate confines of the company even if there was no prior consultation. There is no evidence filed in support to show that 1st respondent had exceeded his powers for some illegitimate or ulterior purpose, (per Haidar J in *Dato' Ibrahim Hj Ismail v. Onstream Marine SB*).

In fact this court finds that it is appropriate at this juncture, to remind itself of the resonance of the statement of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd & Ors* [1973] AC 360 at 379 who observed that:

> The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited Company is more than a mere legal entity, with a personality in law of its own, that there is room in Company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the Company structure ... .

His Lordship went on to state:

> ... The just and equitable provision ... does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights or to exercise them in a particular way.

Viewed in the light of the above statements the events leading to the petition would enable the court to subject the exercise of legal rights to equitable considerations.

It is apparent that the 1st petitioner suffered from a bad case of petulance and peevishness. This led to his mulish resistance to agree to sign the circular resolution to approve the de-merger, despite the serious consequences to the company and the shareholders, should it not go through.

In this, this court finds that the 1st petitioner had acted unreasonably, not least when for good measure, an ultimatum was delivered, as when petitioners indicated they would only sign if the respondents agree to their proposal to restructure the company which includes liquidation and joint management of the group.

This wanton conduct smacks of unreasonableness [see *Re A Company* [1992] BCLC 701], since there are other shareholders in the listed company whose interests would be jeopardised in the event the de-merger is aborted. As cases such as *Charles Forte Investments Ltd v. Amanda* [1964] 1 Ch 240, & *Re Semantan Estate (1952) Ltd* [1952] 28 MLJ 285, have shown, courts will look askance at situations where careless disregard is shown to interests of shareholders.

Viewed in its proper perspective, the 1st petitioner's letter of 7 September 1999 shows just how far the petitioners were prepared to put their own selfish interest to wind up the company ahead of the interests of the TCMH Group

and all its public shareholders as well as the interest of the 9th respondent company and its shareholders as a whole.

Thus bad faith is clearly shown. The complaints of the 1st petitioner after the 11 September EGM were largely against the conduct of the 1st respondent vis-a-vis his position in the company. However, they mostly concern management issues relating to the four public listed companies and should be dealt with at the public listed companies' management level (see *Dato' Ibrahim Hj. Ismail v. Onstream Marine* where the court there held that the proper forum to resolve these issues are the companies themselves). In any case, allegations relating to other companies are irrelevant to justify reasons to wind up a company (see *Kok Fook Sang v. Juta Villa* [1997] 2 CLJ 116).

It is obvious that the complaints are exclusively made against the 1st respondent alone and do not involve the other respondents. In order to support a winding up petition, the petitioners need to show that the relationship between all the shareholders have broken down and not just that they disagree with one or two of them.

The tenacity of the petitioners in wanting a winding up on account of an irretrievable breakdown of "mutual trust and understanding" between them and the respondents, is diluted, when in the next minute, petitioners were heard to have indicated that they have no problem working together with the respondents after the split.

This court has difficulty in comprehending this rather perverse logic, since this translates into a situation where there could not possibly be such an irretrievable breakdown, if the parties could still work together. (see encl. (25) paras. 46, 49, 54, 59)

This brings the matter to another level and that is, such being the case, there seems to be a collateral purpose and bad faith in the petitioner's petition. [*Re Lo Siong Fong*].

What then, could he the 'real' reason for the petition?

In the case of *Re Sin Lee Sang Sawmill Sdn Bhd v. Leong Thong* [1989] 2 CLJ 1209, it was to teach the respondents a lesson. In the instant case, the petitioners seem determined at all costs, to wind up the company, even at the expense of not disclosing to the court the fact that the 1st to 8th petitioners all hold senior positions within the Tan Chong Group, including chairmanship of two public listed companies and managing director, deputy managing director and general manager of key subsidiaries.

It is a fact that none of the petitioners have been removed from any executive position. In fact the petitioners hold more key positions throughout the Tan

Chong Group than the respondents and the 1st petitioner is still very much a cheque signatory.

The petitioner's failure to disclose these and their majority on the board of management of the company amount to abuse of process.

One of the reasons advanced by the petitioners to wind up the company is to unlock their minority position (see para. 103 petition). The actions of the 1st petitioner from then on was based solely and unflinchingly on this one goal.

Given the desire to 'unlock' themselves from their minority position, it appears mystifying that the petitioners, acted in an extraordinary way to the respondent's offer to buy their shares at fair market value, viewing it as "offensive" and "insulting" etc.

This court notes that since the petitioners seemed all geared to part company with the respondents, a share buy-out would have been one way of ensuring that they are not locked-in. Rejecting the respondent's offer is one thing, but to then counter-offer to buy the respondents' shares, is somehow reflective of an undisclosed motive. It is also strange that the petitioners found it perfectly acceptable conduct for them to do the very thing they accused the respondents of doing.

It is a fact that the 9th respondent company owns shares in TCMH, APM, warisan and TCIL. Apart from some of the original shares in TCMH acquired by 9th respondent company from the 1st petitioner and Tan Sri Tan Yuet Foh, none of the shares in TCMH and none of the shares in the other listed companies which are presently held by 9th respondent company belonged to petitioners, as these shares are the assets of the 9th respondent company.

The 9th respondent is basically a family shareholding company which is a healthy and going concern and is the *de facto* controlling shareholder in the four public listed companies namely TCMH, WTCH, APM and TCIL.

The petitioner's desire to 'restructure' and split the shareholding in the 9th respondent company does not necessarily activate distribution in specie and assumptions of owning the shares in the listed companies.

It is inconceivable how the 1st petitioner could ever begin justifying that the petitioners were oppressed and denied participation in the affairs of the 9th respondent company when the petitioners and several of their family members are actively involved in the management of the 9th respondent. Company and companies within the Tan Chong Group of companies.

All the shareholders receive dividends every year in accordance with their shareholdings.

None of these facts are denied by the 1st petitioner. In truth, what the 1st petitioner finds galling is to be outvoted on most counts.

Thus the only thorn in the flesh is that the respondents are in effective control by virtue of their collective shareholding, whilst the petitioners are not, and this fact strikes at the very heart of the petition.

The 1st petitioner's maudlin preoccupation with tradition and remembrance of things past, gets in the way of the practical, pragmatic corporate governance of the day.

As is obvious, to present a winding up petition is a most serious matter.

In these circumstances, it is this court's view that if the petition can be shown to be manifestly unsustainable even at the interlocutory stage, the court should not allow it to languish even a day longer, but instead should strike it off as early as possible.

This is certainly a course open to the respondent, and this brings forth the case of *Ringtower Holdings Ptd* [1988] 5 BCC 82, where Peter Gibson, J, observed:

> Further, I have anxiously throughout borne in mind the cautioning words of Lord Templeman in *Williams & Humbert Ltd v. W & H Trade Marks (Jersey) Ltd* [1986] 1 All ER 19, where he said:
>
> > ... If an application into strike off involves a prolonged and serious argument, the judge should, as a general rule, decline to proceed with the argument, unless he not only harbours doubt about the soundness of the pleading but, in addition, is satisfied that striking off will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.

This court took into consideration the petition and the affidavits filed therein, and reading them as generously as is possible, in the interests of both parties, it seems to this court, that in the circumstances, the 1st petitioner had well and truly put paid to his expectation that equitable considerations would continue to bind the parties.

In any case this court is satisfied that the petition constitutes an abuse of process for the petitioners to have presented a winding up petition on grounds that have been shown to be unsustainable.

Thus this court is quite unable to come to the conclusion that the petition discloses any ground for winding up under the just and equitable ground, and in the circumstances the petition is struck out with costs.